

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DE Technologies, Inc.,)	Cause No. 7:11-cv-00183-GEC
)	
Plaintiff,)	
)	
vs.)	
)	
IShop USA, Inc. and International Checkout, Inc.)	Jury Trial Demanded
)	
Defendants.)	
)	

DEFENDANT ISHOP USA’S ORIGINAL ANSWER AND COUNTERCLAIMS

For its Answer to the Amended Complaint filed by Plaintiff DE Technologies, Inc. (“Plaintiff” or “DE Technologies”), Defendant IShop USA, Inc. (“IShop”) answers and responds as follows.

The Parties

1. IShop is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Amended Complaint and therefore denies the same.

2. IShop admits that it is a corporation organized and existing under the laws of the State of California. IShop denies the remaining allegations contained in Paragraph 2 of the Amended Complaint.

1 3. IShop is without knowledge or information sufficient to form a belief as to the
2 truth of the allegations contained in Paragraph 3 of the Amended Complaint and therefore
3 denies the same.
4

5 **Jurisdiction and Venue**

6 4. IShop admits that Plaintiff purports to allege an action for patent infringement
7 arising under Title 35 of the United States Code and that this Court has subject matter
8 jurisdiction under 28 U.S.C. §§ 1331 and 1338. IShop denies the remaining allegations
9 contained in Paragraph 4 of the Amended Complaint.
10

11 **General Allegations**

12 5. IShop is without knowledge or information sufficient to form a belief as to the
13 truth of the allegations contained in Paragraph 5 of the Amended Complaint and therefore
14 denies the same.
15

16 6. IShop is without knowledge or information sufficient to form a belief as to the
17 truth of the allegations contained in Paragraph 6 of the Amended Complaint and therefore
18 denies the same.
19

20 7. IShop is without knowledge or information sufficient to form a belief as to the
21 truth of the allegations contained in Paragraph 7 of the Amended Complaint and therefore
22 denies the same.
23

24 8. IShop admits that U.S. Patent No. 6,460,020 (the “’020 Patent”) states on its
25 face that it was issued by the United States Patent and Trademark Office on October 1, 2002.
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1 IShop admits that a copy thereof is attached to the Amended Complaint as Exhibit A. IShop
2 denies all other allegations contained in Paragraph 8 of the Amended Complaint.

3
4 9. IShop admits that U.S. Patent No. 6,845,364 (the “364 Patent”) states on its
5 face that it was issued by the United States Patent and Trademark Office on January 18, 2005.

6 IShop admits that a copy thereof is attached to the Amended Complaint as Exhibit B. IShop
7 denies all other allegations contained in Paragraph 9 of the Amended Complaint.

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9 10. IShop is without knowledge or information sufficient to form a belief as to the
10 truth of the allegations contained in Paragraph 10 of the Amended Complaint and therefore
11 denies the same.

12
13 11. IShop is without knowledge or information sufficient to form a belief as to the
14 truth of the allegations contained in Paragraph 11 of the Amended Complaint and therefore
15 denies the same.

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17 12. IShop is without knowledge or information sufficient to form a belief as to the
18 truth of the allegations contained in Paragraph 12 of the Amended Complaint and therefore
19 denies the same.

20
21 13. IShop is without knowledge or information sufficient to form a belief as to the
22 truth of the allegations contained in Paragraph 13 of the Amended Complaint and therefore
23 denies the same.

24
25 14. IShop is without knowledge or information sufficient to form a belief as to the
26 truth of the allegations contained in Paragraph 14 of the Amended Complaint and therefore
27 denies the same.

1 15. IShop is without knowledge or information sufficient to form a belief as to the
2 truth of the allegations contained in Paragraph 15 of the Amended Complaint and therefore
3 denies the same.
4

5 16. IShop is without knowledge or information sufficient to form a belief as to the
6 truth of the allegations contained in Paragraph 16 of the Amended Complaint and therefore
7 denies the same.
8

9 17. IShop is without knowledge or information sufficient to form a belief as to the
10 truth of the allegations contained in Paragraph 17 of the Amended Complaint and therefore
11 denies the same.
12

13 **The Defendants' Infringing Activities**

14 18. IShop is without knowledge or information sufficient to form a belief as to the
15 truth of the allegations contained in Paragraph 18 of the Amended Complaint and therefore
16 denies the same.
17

18 19. Denied.

19 20. Denied.

20 21. Denied.

21 22. IShop is without knowledge or information sufficient to form a belief as to the
22 truth of the allegations contained in Paragraph 22 of the Amended Complaint and therefore
23 denies the same.
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23. IShop is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Amended Complaint and therefore denies the same.

24. IShop is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Amended Complaint and therefore denies the same.

25. IShop is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 of the Amended Complaint and therefore denies the same.

AFFIRMATIVE DEFENSES

First Affirmative Defense

As a first and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, the '020 patent is invalid for failing to meet the statutory and decisional requirements for patentability, including those of 35 U.S.C. §§ 101, 102, 103 and/or 112.

Second Affirmative Defense

As a second and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, the '364 patent is invalid for failing to meet the statutory and decisional requirements for patentability, including those of 35 U.S.C. §§ 101, 102, 103 and/or 112.

Third Affirmative Defense

As a third and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, IShop does not infringe (not directly, contributorily, or by inducement) any claim of the '020 patent.

Fourth Affirmative Defense

As a fourth and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, IShop does not infringe (not directly, contributorily, or by inducement) any claim of the '364 patent.

Fifth Affirmative Defense

As a fifth and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, Plaintiff is barred from relief for any or all infringement of the '020 and '364 patents under the doctrine of laches.

Sixth Affirmative Defense

As a sixth and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, Plaintiff is barred from relief for any or all infringement of the '020 and '364 patents under the doctrine of waiver.

Seventh Affirmative Defense

As a seventh and separate defense, and solely by the way of an alternative defense and not to be construed as an admission, Plaintiff is barred from relief for any or all infringement of the '020 and '364 patents under the doctrine of equitable estoppel.

Eighth Affirmative Defense

On information and belief, Plaintiff is barred from obtaining relief for any or all infringement of the '020 and '364 patents for failure to satisfy the notice requirements of 35 U.S.C. § 287.

Ninth Affirmative Defense

On information and belief, Plaintiff is barred from obtaining relief for any or all infringement of the '020 and '364 patents for engaging in inequitable conduct as explained below.

COUNTERCLAIMS

Pursuant to Rule 14 of the Federal Rules of Civil Procedure, IShop for its Counterclaims against Plaintiff, alleges as follows:

The Parties

1. IShop USA, Inc. ("IShop") is a corporation organized and existing under the laws of the State of California, with its principal place of business at 20620 South Leapwood Ave., Suite F, Carlson, California 90746.

2. Upon information and belief, Plaintiff DE Technologies, Inc. ("DE Technologies") is a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 1715 Pratt Drive, Suite 3500, Blacksburg, Virginia 24064.

Jurisdiction and Venue

3. Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(B) and by virtue of DE Technologies' admissions in the Complaint that venue is proper in this district.

4. This Court has personal jurisdiction over DE Technologies.

5. This Court has subject matter jurisdiction over these Counterclaims pursuant to 28 U.S.C. §§ 1331 and 1338.

COUNT ONE: Declaratory Judgment of Non-Infringement of the '020 Patent

6. Based upon DE Technologies' filing of its suit and IShop's affirmative defenses, an actual controversy has arisen and now exists between the parties as to whether IShop has directly and/or indirectly infringed any valid claim of the '020 Patent.

7. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 et seq., IShop requests a declaration from the Court that IShop has not infringed any valid claim of the '020 Patent, either directly, contributorily, or by inducement, or either literally or under the doctrine of equivalents.

8. The conduct of DE Technologies in alleging patent infringement has been willful, in bad faith, and/or in reckless disregard of the rights of IShop.

COUNT TWO: Declaratory Judgment of Non-Infringement of the '364 Patent

9. Based upon DE Technologies' filing of its suit and IShop's affirmative defenses, an actual controversy has arisen and now exists between the parties as to whether IShop has directly and/or indirectly infringed any valid claim of the '364 Patent.

1 10. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 et seq.,
2 IShop requests a declaration from the Court that IShop has not infringed any valid claim of
3 the '364 Patent, either directly, contributorily, or by inducement, or either literally or under
4 the doctrine of equivalents.
5

6 11. The conduct of DE Technologies in alleging patent infringement has been
7 willful, in bad faith, and/or in reckless disregard of the rights of IShop.
8

9 **COUNT THREE: Declaratory Judgment of Invalidity of the '020 Patent**

10 12. Based upon DE Technologies' filing of its suit and IShop's affirmative
11 defenses, an actual controversy has arisen and now exists between the parties as to whether
12 IShop has directly and/or indirectly infringed any valid claim of the '020 Patent.
13

14 13. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 et seq.,
15 IShop requests a declaration from the Court that each of the claims of the '020 Patent is
16 invalid because it fails to comply with the provisions of the patent laws, 35 U.S.C. § 100 et
17 seq., including but not limited to one or more of 35 U.S.C. §§ 101, 102, 103, and/or 112.
18

19 **COUNT FOUR: Declaratory Judgment of Invalidity of the '364 Patent**

20 14. Based upon DE Technologies' filing of its suit and IShop's affirmative
21 defenses, an actual controversy has arisen and now exists between the parties as to whether
22 IShop has directly and/or indirectly infringed any valid claim of the '364 Patent.
23

24 15. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 et seq.,
25 IShop requests a declaration from the Court that each of the claims of the '364 Patent is
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invalid because it fails to comply with the provisions of the patent laws, 35 U.S.C. § 100 et seq., including but not limited to one or more of 35 U.S.C. §§ 101, 102, 103, and/or 112.

COUNT FIVE: Declaratory Relief Regarding Inequitable Conduct on Behalf of DE Technologies

16. Based upon DE Technologies' filing of its suit and IShop's affirmative defenses, an actual controversy has arisen and now exists between the parties as to whether IShop has directly and/or indirectly infringed any valid claim of the '020 and '364 patents.

17. On information and belief, IShop alleges as follows: A first basis for finding inequitable conduct is that DE Technologies deliberately withheld the existence and identity of other inventors of the claim invention from the United States Patent and Trademark Office ("PTO"). Ed Pool, Doug Mauer (collectively "the named inventors"), and/or their representatives breached their duty of candor by withholding this material information with intent to deceive.

18. The basis of the '020 and '364 patents is the U-Shop system, which was disclosed in DE Technologies' provisional patent application 60/033,984 (the "'984 application") and was developed by a number of individuals other than Ed Pool and Doug Mauer including: Ed Schwartz, Michael Bame, Russell Shock, and David Messner (collective "Other inventors").

19. In particular, David Messner was responsible for coding for the U-Shop system, including invention and creation of the database interfaces, *i.e.*, middleware, for accessing the various databases in the U-Shop system. David Messner began writing this and other code

1 after meeting with Ed Schwartz, Michael Bame, and/or Russell Shock to discuss the features
2 and proposed functionality of the Ushop system, including how that system would allow for
3 language selection, currency selection and access of databases containing price information,
4 product codes and international shipping information.
5

6 20. David Messner also collaborated with Ed Schwartz, who was the individual
7 primarily responsible for structuring, updating, and maintaining the various U-Shop
8 databases. Ed Schwartz conceived, at least in part, the claimed system for accessing these
9 databases, calculating some transaction costs, and allowing a customer to select a language
10 and currency.
11

12 21. The involvement of these other inventors in the conception and reduction to
13 practice of the U-Shop system and one or more of the claimed features in the '020 and '364
14 patents was never disclosed to the PTO.
15

16 22. Ed Pool and Doug Mauer, the named inventors of the '020 and '364 patents,
17 were incapable of inventing the systems claimed therein. Ed Pool, in his own words, is not an
18 "expert on computers," a "software engineer," or even a "database guy." Doug Mauer
19 confirmed this, testifying that he was the "sole technical guy" named as an inventor on the
20 patents-in-suit, but also admitting that he would not have known how to write the code for the
21 U-Shop system.
22

23 23. There is a substantial likelihood that a reasonable PTO examiner would have
24 considered knowledge of these other inventors important in deciding to allow the applications
25 that issued as the '020 and '364 patents. For example, these other inventors would be
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1 required to file inventors' declarations and review statements in DE's patent applications
2 regarding their invention. Notably, these other inventors disagreed with Ed Pool's decision to
3 file a patent application because, among other things, they believed the U-Shop system was
4 not patentable.
5

6 24. A second basis for finding inequitable conduct is the false statements that Ed
7 Pool and Doug Mauer made in sworn declarations submitted to the PTO in order to secure
8 allowance of the '020 and '364 patents. Ed Pool and Doug Mauer breached their duty of
9 candor by making these material and false statements with intent to deceive.
10

11 25. During prosecution of DE Tech's patents, at least two declarations were filed
12 regarding the features of the U-Shop system. These declarations are the Second
13 Supplemental Declaration of Ed Pool dated April 11, 2002, ("Pool Declaration") and the
14 Declaration of Doug Mauer dated June 18, 2002 ("Mauer Declaration").
15

16 26. The Pool Declaration attaches printed copies of screen shots from the U-Shop
17 web site, which are described as "a series of printouts of pages of a preliminary test web site"
18 that was "operational prior to the Critical Date." The Pool Declaration defines "Critical Date"
19 as prior to May 1996.
20

21 27. Paragraph 8 of the Pool Declaration states that prior to May 1996 the U-Shop
22 web site was capable of "triggering an electronic process for confirming the existence of
23 available funds."
24

25 28. Paragraph 7 of the Pool Declaration states that prior to May 1996 the U-Shop
26 web site displayed the "the total charges for the transaction" to the user on a checkout page,
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28

1 “reflecting element (f), determining a total cost of the transaction that includes a price of the
2 product.”

3
4 29. Paragraph 4 of the Pool Declaration states that prior to May 1996 the U-Shop
5 web site “produced an electronic record constituting a ‘commercial invoice’, as that term is
6 understood in the patent application.” That paragraph also states that “[f]or testing purposes,
7 the commercial invoice was printed from the electronic record established by the operation of
8 the web site.” Paragraph 8 of the Pool Declaration further states that prior to May 1996, part
9 of the processing performed by the U-Shop web site and related databases included
10 “generation of a commercial invoice, first in electronic form, and then printed as described
11 above.”
12

13
14 30. The Mauer Declaration states that Doug Mauer reviewed the content of the Pool
15 Declaration and agreed that all of the statements therein were true. Specifically, the Mauer
16 Declaration states: “I have reviewed the content of the Declaration and the content thereof is
17 true of my own knowledge.” Both Ed Pool and Doug Mauer swore that the content of these
18 declarations was true and accurate.
19

20 31. In reality, the U-Shop web site was not capable of performing the functions of:
21 (1) triggering an electronic process for confirming the existence of available funds; (2)
22 calculating and displaying a total cost of the transaction; and (3) generating and/or printing an
23 electronic title and/or commercial invoice as of May 1996.
24

25 32. The code for the U-Shop web site is attached to the ’984 application that was
26 filed on December 30, 1996. All of the code for the U-Shop web site is attached to that
27
28

1 application.

2 33. The computer code attached to the '984 application does not include code for
3 performing the functions identified above in paragraph 95.
4

5 34. There is a substantial likelihood that a reasonable PTO examiner would have
6 considered the false statements in the Pool and Mauer Declarations important in deciding
7 whether to allow the applications that issued as the '020 and '364 patents; in particular,
8 because these declarations were intended to antedate prior art that the examiner had
9 previously suggested rendered the claims anticipated and/or obvious under 35 U.S.C. §§ 102
10 and 103. Indeed, the examiner's notice of allowability for the '020 patent states that certain
11 prior art was "sworn behind by employing a 131 Declaration executed by applicant (Pool)."
12
13

14 35. A third basis for finding inequitable conduct is false statements made by both
15 Ed Pool and Bruce Lagerman during an interview with the PTO examiner. Ed Pool and
16 Bruce Lagerman breached their duty of candor by making these material and false statements
17 with intent to deceive.
18

19 36. Specifically, during an interview with the PTO on January 3, 2002, the
20 applicant and the PTO examiner agreed to add the limitation of "running a transaction
21 program on a computer system so as to integrate" processes and components to all of the
22 claims. During that interview, both Ed Pool and his attorney, Bruce Lagerman, stated to the
23 PTO that as of that date they were unaware of any entity practicing the claimed invention.
24

25 37. In his deposition conducted by counsel for Dell, Ed Pool confirmed that he told
26 the PTO examiner that as of January 3, 2002, he was unaware of any entity practicing the
27
28

1 claimed invention.

2 38. On information and belief, as of January 3, 2002, Ed Pool, Bruce Lagerman,
3 and/or other DE representatives believed that a number of entities were practicing the claimed
4 invention. For example, DE sent letters both before and soon after that date alerting various
5 entities to its pending patent applications and suggesting that those entities seek a license to
6 DE's intellectual property.
7

8 39. The PTO examiner viewed the statement that no one was practicing the claimed
9 invention as of January 3, 2002, as important to allowance of the claims. Indeed, that
10 statement is repeated multiple times in the official PTO record: in the interview summary and
11 the notice of allowance. Moreover, there is a substantial likelihood that a reasonable PTO
12 examiner would have considered this statement by Ed Pool and Bruce Lagerman important in
13 deciding to allow of the patent claims because, *e.g.*, it evidenced that the applicant, his
14 attorney and the PTO examiner shared a common understanding of the scope of the patent
15 claims. This statement was also material to overcoming the rejections of obviousness, under
16 35 U.S.C. § 103, previously asserted by the examiner.
17

18 40. A fourth basis for inequitable conduct is prior art web sites, software and
19 systems that the named inventors and/or their representatives were aware of, but did not
20 disclose to the PTO during prosecution. The named inventors and/or their representatives
21 breached their duty of candor by withholding material knowledge of these prior art web sites,
22 software, and systems with intent to deceive.
23

24 41. Prior to filing the '984 application and the '020 and '364 patents, the named
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1 inventors and/or their representatives were aware of certain e-commerce websites and
2 companies offering e-commerce transaction programs including at least the following:
3 Cyberian Outpost, Open Market, Planet Shopping, and Macromedia.
4

5 42. These websites and transaction programs allowed users in the United States and
6 other countries to buy and sell goods online and were prior art under 35 U.S.C. § 102 to
7 subject matter disclosed in the '984 application and the '020 and '364 patents.
8

9 43. None of these prior art websites and transaction programs were disclosed to the
10 PTO during prosecution of the '020 and '364 patents, nor are they merely duplicative of the
11 prior art before the PTO.
12

13 44. There is a substantial likelihood that a reasonable PTO examiner would have
14 considered knowledge of these websites and transaction programs important in deciding
15 whether to allow of the claims of the '020 and '364 patents, in particular, because these
16 websites and transaction programs evidence that the claimed invention is anticipated and/or
17 obvious under 35 U.S.C. §§ 102 and 103.
18

19 45. A fifth basis for finding inequitable conduct is statements the applicants made
20 during prosecution that misrepresent the disclosure of the prior art Chelliah patent and the
21 capabilities of the AVP tax engine. The named inventors and/or their representatives
22 breached their duty of candor by materially misrepresenting the disclosure of Chelliah and the
23 capabilities of the AVP tax engine with intent to deceive.
24

25 46. In the applicant's official response to the PTO dated January 5, 2000, the
26 applicants falsely characterized the teachings of the Chelliah patent. Specifically, that
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1 response states: “the AVP tax engine [discussed in the Chelliah patent] is well-known to be
2 limited to sales taxes applied within the United States. The AVP tax engine does not address
3 foreign duties and import/export taxes. Nor does this tax engine calculate taxes based upon
4 the combined value of the shipping costs and the costs of the goods, as is done in the system
5 of the present invention.”
6

7 47. In truth, however, the “AVP tax engine” had the capability to address and was
8 in use to calculate foreign duties and import/export taxes prior to the filing date of the ’984
9 application and the ’020 and ’364 patents.
10

11 48. There is a substantial likelihood that a reasonable PTO examiner would have
12 considered this statement important in deciding to allow the patent claims; in particular,
13 because the named inventors and/or their representatives made this statement in an attempt to
14 overcome an obviousness rejection previously made by the PTO examiner under 35 U.S.C. §
15 103.
16

17 49. Each of the five sets of acts plead in paragraphs 16-49 constitutes an
18 intentional, material breach of the duty of candor to the PTO held by DE Technologies, the
19 named inventors, and/or their representatives. Consequently, each of these five sets of acts
20 constitutes a separate ground for finding inequitable conduct and holding the claims of the
21 ’020 and ’364 patents unenforceable.
22

23 50. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq.,
24 IShop requests a declaration from the Court that the ’020 and ’364 patents are unenforceable
25 because of inequitable conduct before the PTO.
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Exceptional Case

51. On information and belief, this is an exceptional case entitling IShop to an award of its attorneys' fees incurred in connection with defending and prosecuting this action pursuant to 35 U.S.C. § 285, as a result of, *inter alia*, DE Technologies' assertion of the Patents-in-suit against IShop with the knowledge that IShop does not infringe any valid or enforceable claim of the Patents-in-suit and/or that the Patents-in-suit are invalid and/or unenforceable.

PRAYER FOR RELIEF

WHEREFORE, IShop prays for judgment as follows:

- a. A judgment dismissing DE Technologies' Amended Complaint against IShop with prejudice;
- b. A judgment finding that DE Technologies is not entitled to the relief it requests or any of relief in this case;
- c. A judgment finding that DE Technologies is not entitled to an accounting or an award of damages, interest, or costs in this case;
- d. A judgment declaring that IShop has not infringed, contributed to the infringement of, or induced others to infringe, either directly or indirectly, any valid and enforceable claim of the '020 Patent;
- e. A judgment declaring that IShop has not infringed, contributed to the infringement of, or induced others to infringe, either directly or indirectly, any valid and enforceable claim of the '364 Patent

- f. A judgment declaring that the '020 Patent is invalid and unenforceable;
- g. A judgment declaring that the '364 Patent is invalid and unenforceable;
- h. A judgment declaring that IShop has not willfully infringed and is not willfully infringing any valid and/or enforceable claim of the '020 Patent;
- i. A judgment declaring that IShop has not willfully infringed and is not willfully infringing any valid and/or enforceable claim of the '364 Patent;
- j. A judgment declaring that this case is exceptional and an award to IShop of its reasonable costs and expenses of litigation, including attorneys' fees and expert witness fees;
- k. A judgment declaring, limiting or barring DE Technologies' ability to enforce the '020 Patent in equity;
- l. A judgment declaring, limiting or barring DE Technologies' ability to enforce the '364 Patent in equity;
- m. A judgment declaring the '020 and '364 patents unenforceable because of inequitable conduct before the United States Patent and Trademark Office.
- n. Such other relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

In accordance with Federal Rule of Civil Procedure 38(b), IShop demands a trial by jury on all issues so triable.

1 Dated: August 31, 2011

Respectfully submitted,

2 /s/ Arthur P. Strickland

3 Arthur P. Strickland

4 VA. State Bar No. 13337

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